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Supreme Court, U.S.
FILED
FEB 23 2001
CLERK

No. 00-1198

In The

Supreme Court of the United States

BENJAMIN J. CAYETANO and EARL I. ANZAI,

Petitioners,

v.

CHEVRON U.S.A. INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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28 pp

STATEMENT PURSUANT TO RULE 29.6

Respondent Chevron U.S.A. Inc. is a wholly-owned subsidiary of Chevron Corporation, which is a publicly-traded company. Chevron Corporation does not have a parent corporation.

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STATEMENT OF THE CASE

Respondent Chevron U.S.A. Inc. markets petroleum products in the State of Hawaii, primarily through retail service stations that it leases to independent dealers. Chevron is both the landlord and the wholesale supplier of the gasoline the dealers resell to consumers.

At the heart of this dispute is Section 3(c) of Act 257 of the Hawaii legislature, passed in 1997. That statute limited the rent that Respondent may charge its lessee service station dealers. The Act caps Respondent's maximum rental income at a level *below* Respondent's total real estate costs.

The commercial relationship at issue in this case has several unique facets. First, as noted above, Respondent is both landlord and a wholesaler of products to the dealers. Second, due to unique aspects of state and federal law, the dealers' leasehold interests may be sold (subject to Respondent's right in good faith to disapprove of a new dealer), meaning that there is a market for the right to do business at each service station location. Third, the parties stipulated in the district court that, all other things being equal, these circumstances, combined with the rent control provisions of Act 257, increase the resale value to the dealer of the leasehold interest.

Respondent contended in the courts below that these facts meant that Act 257's rent control provisions effected a regulatory taking of Respondent's property under the Takings Clause of the Fifth Amendment to the United States Constitution, because the law did not "substantially advance a legitimate state interest." *See Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980).

The district court agreed and granted summary judgment in Respondent's favor. Specifically, the district court found that the rent cap provision failed to substantially advance the state's legitimate interest since incumbent dealers can capture the value of the reduced rent in the form of a premium when they sell their dealerships, which leads to the overall expenses of the new dealer remaining the same as before the rent cap; as a result, there are no savings to be passed on to customers in the form of lowered gasoline prices. Petitioners' Appendix (hereinafter "Pet. App."), pp. 57-61. The district court also determined that because Respondent has two income streams from each dealer as both the landlord charging rent and the supplier of the dealer's fuel, Respondent could simply charge dealers an increased price for fuel, thereby eliminating the benefit of the rent cap to the dealers.[1] Pet. App., pp. 62-66.

The Ninth Circuit agreed that the proper legal test had been applied (Pet. App., p. 13), but disagreed that summary judgment was proper. The Ninth Circuit found *factual disputes* as to the fundamental question in the case – whether Act 257 had effected a regulatory taking – so it remanded the case to the district court for additional development of the factual record. Pet. App., pp. 17, 20.

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[1] Contrary to Petitioners' assertion, this second finding by the district court was not "somewhat inconsistent[ ]." Petition, p. 3. It simply shows that there are two *independent* reasons why Act 257 is invalid. Act 257 is *antithetical* to its purported purpose if its only result is to force Respondent to cover its costs in Hawaii by raising its wholesale gasoline prices to lessee dealers.

REASONS FOR DENYING THE WRIT

This is a "regulatory takings" case decided under the Takings Clause of the Fifth Amendment to the United States Constitution.[2] The courts below applied long settled precedent from this Court in deciding what test to apply to determine whether a taking had occurred. Petitioners do not contend that the Ninth Circuit erred as a matter of law. To the contrary, their entire argument is premised on the assertion that the law itself is wrong. The Petition should be denied for three principal reasons: First, there is no justification for the radical change in law Petitioners demand. The courts below applied law that has been settled for more than twenty years. Second, this case does not present the far-reaching consequences asserted by Petitioners. The fact that the lower courts simply applied long-standing precedent from this Court refutes Petitioners' claim that the Ninth Circuit's opinion may disrupt land-use regulation in the West. Finally, the Petition is premature, because the Ninth Circuit remanded this case to the district court for further fact-finding. There is currently no final ruling that a taking has occurred, and, indeed, there may never be such a ruling.

Early in the last century, this Court made clear that the Takings Clause applies to more than just physical appropriation by the State of private property. Under the

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[2] It is well established that the Takings Clause is applicable to the States through the Fourteenth Amendment. *E.g., Dolan v. City of Tigard*, 512 U.S. 374, 383-384 (1994). In relevant part, the Takings Clause provides: "[N]or shall private property be taken for public use, without just compensation."

"regulatory takings" doctrine, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922); *see generally Yee v. City of Escondido*, 503 U.S. 519, 523 (1992). In *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 127 (1978), the Court expanded on this notion, observing that "[A] use restriction may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial government purpose."

In *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), the Court stated the test that is at the heart of Petitioners' argument:

> "The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests [citations] or denies an owner economically viable use of his land [citations]."

Accord, Nollan v. California Coastal Commission, 483 U.S. 825, 834 (1987) ("long recognized" rule).

The Ninth Circuit unambiguously followed this rule in setting forth the standard against which the district court must judge Act 257 on remand:

> "The correct test is 'whether the legislation substantially advances a legitimate state interest,' as discussed above, as suggested by the Supreme Court in *Yee [v. City of Escondido*, 503 U.S. 519 (1992)], as used by the district court in this case, and as established by this court in *Richardson [v. City and County of Honolulu*, 124 F.3d 1150 (9th Cir. 1997), *cert. denied*, 525 U.S. 871 (1998)]."

Pet. App., p. 13.

I. THERE IS NO JUSTIFICATION FOR ABANDONING THE LONG SETTLED LAW ON WHICH THE NINTH CIRCUIT'S DECISION WAS BASED.

The courts below in this case applied settled law under the Takings Clause. Petitioners do not assert that the courts below erred in interpreting that law. Rather, they claim that the law itself is wrong. Petitioners ask the Court to abandon decades of precedent in favor of a "due process" test that would give unwarranted latitude to state legislatures and would thwart long accepted, legitimate judicial scrutiny under the Takings Clause. There is no justification for this proposed change and it should be summarily rejected.

A. The Ninth Circuit properly applied settled law under the Takings Clause.

The Petition is a frontal attack on the validity of the "substantially advances a legitimate state interest" test. Rather than admit that they are asking this Court to overturn long settled law, Petitioners instead coyly assert that "[i]t is high time the Court clarify that the *Agins* formulation amounts only to inadvertent *dicta*." Petition, p. 7. This assertion is wrong on its face. The *Agins* Court expressly applied that test and concluded that the City of Tiburon's zoning ordinances "substantially advance legitimate governmental goals." *Agins v. City of Tiburon, supra,* 447 U.S. at 261.

Beyond that, Petitioners' suggestion that the *Agins* holding is an aberration is disingenuous, at best. *Agins* was a unanimous decision of this Court and has been the

law for more than twenty years. As noted above, the *Agins* rule was foreshadowed in the Court's 1978 *Penn Central* decision. The rule of law that Petitioners would have the Court consign to the scrap heap of mere "inadvertent dicta" has been followed by this Court in *Dolan v. City of Tigard, supra,* 512 U.S. at 385, and in *Nollan v. California Coastal Commission, supra,* 483 U.S. at 834.

Any suggestion that the "substantially advances a legitimate state interest" test was a mistake (or, "inadvertent dicta") is squarely refuted by *Nollan v. California Coastal Commission,* 483 U.S. 825 (1987). There, the Court succinctly noted the *intentional differences* among Due Process, Equal Protection and Takings Clause standards:

> "[O]ur opinions do not establish that these [Takings Clause] standards are the same as those applied to due process or equal protection claims. To the contrary, our verbal formulations in the takings field have generally been quite different. We have required that the regulation 'substantially advance' the 'legitimate state interest' sought to be achieved, *Agins v. Tiburon,* 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980), not that 'the State "could rationally have decided" that the measure adopted might achieve the State's objective.' [citation omitted] . . . [T]here is no reason to believe (and the language of our cases gives some reason to disbelieve) that so long as the regulation of property is at issue the standards for takings challenges, due process challenges, and equal protection challenges are identical; any more than there is any reason to believe that so long as the regulation of speech is at issue the

> standards for due process challenges, equal protection challenges, and First Amendment challenges are identical."

Id. at 834 n. 3.

Nothing in *City of Monterey v. Del Monte Dunes of Monterey, Ltd.*, 526 U.S. 687 (1999), cited at pp. 8-9 of the Petition, changes this analysis. *Del Monte Dunes* applies to a situation wholly unlike this case, where a landowner claims that *physical exactions* demanded by a city are excessive compared to the potential impact of a proposed development. In *Nollan* and *Dolan*, the Court dealt with exactions and dedications – i.e., requirements that landowners give up control of part of their property in exchange for the right to modify or develop it. The Court in those cases required "rough proportionality" between the dedications demanded and the development's anticipated impact. In *Del Monte Dunes*, the Court held that this analysis was inapplicable where the landowner did not claim the physical exactions were excessive. *City of Monterey v. Del Monte Dunes at Monterey, Ltd., supra*, 526 U.S. at 702-703.

But nowhere did the *Del Monte Dunes* Court suggest that it was abandoning the "substantially advances a legitimate state interest" test in regulatory takings cases. The Court noted that the district court's instructions to the jury – which asked the jury to decide whether the city's actions "did not substantially advance a legitimate public purpose" (*id.* at 700) – were "consistent with our previous general discussions of regulatory takings liability." *Id.* at 704 (citing cases, including *Agins* and *Yee*, a rent control case). The Court ultimately upheld the jury's verdict in favor of the landowner, disregarding the

"rough proportionality" claim. It did so based on the lower court's finding of an insufficient "nexus" between the City's denial of Del Monte's application and the City's stated objectives. *Id.* at 703. In other words, the City's actions did not substantially advance a legitimate public interest.

B. The regulatory taking at issue in this case was properly analyzed under the Takings Clause, not the Due Process Clause.

Petitioners assert that there is no "reasoned justification" for analyzing Act 257's regulation of commercial real estate under the Takings Clause, when other commercial regulations may be reviewed under the Due Process Clause. Petition, p. 19. But Petitioners' *ipse dixit* argument misses the point. Petitioners would essentially have the Court turn a blind eye to the Takings Clause in regulatory taking cases. What is lacking is any "reasoned justification" for ignoring part of the Constitution and conflating Takings Clause jurisprudence with Due Process Clause jurisprudence.

Act 257 should be reviewed under the Takings Clause because the statute imposes a regulation of Respondent's use of its real property, and the Takings Clause places limits on the regulations a State legislature can impose on landowners. Property rights are important; indeed they are explicitly protected by the Bill of Rights. There is no basis for relegating commercial property rights to second class status, simply because the State of Hawaii fears interference with its legislative judgments:

> "But simply denominating a governmental measure as a 'business regulation' does not immunize it from constitutional challenge on the ground that it violates a provision of the Bill of Rights. . . . We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or the Fourth Amendment, should be relegated to the status of poor relation in these comparable circumstances."

Dolan v. City of Tigard, supra, 512 U.S. at 392.

C. Petitioners would gut the regulatory takings doctrine and effectively immunize legislative action from legitimate scrutiny under the Takings Clause.

Petitioners' argument proves too much, for it would essentially require the Court to abandon the doctrine of regulatory takings under the Fifth Amendment and replace it with a Due Process analysis. They argue:

> "The Due Process Clause serves as a substantive limit on governmental power; laws found in violation generally are held invalid. The Takings Clause, by contrast, 'is designed not to limit governmental interference with property rights *per se,* but rather to secure compensation in the event of otherwise proper interference amounting to a taking.' *First English Evangelical Lutheran Church v. County of Los Angeles,* 482 U.S. 304, 315 (1987) (emphasis in original)."

Petition, p. 12. In short, Petitioners assert that *any* lawsuit which may be characterized as questioning the "wisdom"

of State legislation may *only* be analyzed under the Due Process Clause.[3]

But adopting such a rule would mean a fundamental retrenchment of Fifth Amendment jurisprudence. While physical takings could still be analyzed under the Takings Clause, regulatory takings could not. This Court has recognized that close scrutiny of legislative actions is the *sine qua non* of *all* regulatory takings cases, since they "necessarily entail[ ] complex factual assessments of *the purposes and economic effects* of government actions." *Yee v. City of Escondido, supra,* 503 U.S. at 523 (emphasis added). Under the rule proposed by Petitioners, examining the "purposes and economic effects" of legislation is at worst impermissible; at best it is something only to be done under the Due Process Clause.[4]

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[3] To support the proposition that due process standards should be applied in all challenges to land use regulations, Petitioners cite three Circuit Court cases, where the court applied due process standards to analyze local denials of building permits or zoning requests. Petition, pp. 20-21. Those cases are inapposite, however, since the parties in those cases did *not* assert that the actions taken by the local boards violated the Takings Clause.

[4] Petitioners imply that regulatory takings cases asserting that a regulation denied economically viable use of land might still be proper under the Takings Clause. *See* Petition, p. 5. But this position cannot be squared with Petitioners' refusal to agree that courts may ever judge the "wisdom" of legislation under the Takings Clause and this Court's statement that all regulatory takings cases necessarily involve such an analysis. *See Yee v. City of Escondido, supra,* 503 U.S. at 523.

D. Petitioners' dangerous assault on *stare decisis* should be rejected.

Petitioners urge this Court to discard its decades-old precedent in favor of a wholly new standard for regulatory takings cases. Important policy considerations, however, preclude courts from simply throwing out long-standing precedent. Among these considerations are inspiring public faith in the judiciary, providing a clear guide for the conduct of individuals, and promoting expedient resolution of disputes by creating an established body of law. *See, e.g., Moragne v. States Marine Lines*, 398 U.S. 375, 403 (1970), where the Court pointed out:

> "Very weighty considerations underlie the principle that courts should not lightly overrule past decisions. Among these are the desirability that the law furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise; the importance of furthering fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case; and the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments. The reasons for rejecting any established rule must always be weighed against these factors."

See also Vasquez v. Hillery, 474 U.S. 254, 265-266 (1986) (*stare decisis* "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact"). Petitioners' attack on

the bedrock principles of regulatory takings jurisprudence established in *Agins* should be rejected.

II. THIS CASE DOES NOT PRESENT THE FAR-REACHING CONSEQUENCES ALLEGED BY PETITIONERS.

Petitioners' argument ultimately comes down to a single point: The law announced decades ago by this Court is wrong because Petitioners believe it fails to give sufficient deference to legislative judgments. In the absence of such deference, Petitioners speculate, "all state and local government regulation touching land" is in jeopardy. Petition, pp. 14-15. Petitioners are wrong, both as a matter of law and fact. Petitioners' rash speculation does not provide a basis for granting the writ.

A. The test formulated by this Court and applied by the Ninth Circuit in this case does not impermissibly infringe on the authority of the Hawaii legislature.

There is no justification for the extraordinary change in long settled law that Petitioners advocate. While we are mindful of the respect to which State legislatures are entitled, it is plain that Petitioners go too far. The "substantially advances" test is illegitimate, in Petitioners' opinion, because it "affords the decision of the Hawaii legislature no deference at all." Petition, p. 17.[5] Petitioners' ill-considered request that the Court essentially

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[5] Petitioner mistakenly refers to the test applied by the Ninth Circuit as a "standard of review." *E.g.*, Petition, pp. 3, 8,

overrule the doctrine of regulatory takings in the pursuit of "consistency" between the Due Process and Takings Clause tests is too radical a step to take.[6]

Petitioners' argument is based on an unsound major premise. While some deference to legislative judgments is appropriate, this Court has recognized since *Marbury v. Madison*, 5 U.S. 137, 176-178 (1803), that legislative power is not absolute. The Fifth Amendment Takings Clause is itself designed to be a *limitation* on legislative power. This Court has made clear that some "interference" with legislative freedom is the price we pay for living under the Constitution:

> "We realize that even our present holding will undoubtedly lessen to some extent the freedom and flexibility of land-use planners and governing bodies of municipal corporations when enacting land-use regulations. But such consequences necessarily flow from any decision upholding a claim of constitutional right; many of the provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities, and the Just Compensation Clause of the Fifth Amendment is one of them. As Justice Holmes aptly noted more than

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15. *Agins* and its progeny do not establish a "standard of review" in the traditional sense. Rather, they set forth an *evidentiary burden* that must be met to uphold a statute under the Takings Clause, i.e., that it "substantially advances a legitimate state interest."

6 As noted above, more than a decade ago, the Court made clear that the Due Process and Takings Clause tests are *intentionally* different. *Nollan v. California Coastal Commission*, *supra*, 483 U.S. at 843 n. 3.

> 50 years ago, 'a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.' *Pennsylvania Coal Co. v. Mahon*, 260 U.S. at 416, 43 S.Ct. at 160."

First English Evangelical Lutheran Church of Glendale v. County of Los Angeles California, 482 U.S. 304, 321-322 (1987). *See also* William A. Fischel, *Regulatory Takings: Law, Economics & Politics* 53-54 (Harvard Univ. Press 1995).

There is no reason to believe, as Petitioners contend, that the "substantially advances a legitimate state interest" test inherently "affords the decision of the Hawaii legislature no deference at all." Petition, p. 17. To the contrary, the test (both in theory and in practice) still affords *appropriate* deference to legislative bodies. For example, while the test requires that the legislation substantially advance a *legitimate* state interest, reported decisions make clear that courts have given great deference to legislative determinations of what constitutes a "legitimate state interest." *E.g., Agins v. City of Tiburon, supra*, 447 U.S. at 261 (protecting residents from "ill effects of urbanization" has "long been recognized as legitimate"); *Richardson v. City and County of Honolulu, supra*, 124 F.3d at 1165-1166 (assuming that maintaining affordable housing is legitimate interest); Pet. App., pp. 43-44, 49 (reference by district court to legislature's "strongly felt concerns" regarding gasoline prices and noting that legislative acts are presumptively constitutional). Moreover, as the district court recognized in this action, nothing in the *Agins* rule alters the presumption of constitutionality afforded all legislation. Pet. App., p. 49.

See also Eastern Enterprises v. Apfel, 524 U.S. 498, 523 (1998) (party challenging constitutionality of statute "bears a substantial burden").

B. The test in *Agins* has been the law for more than two decades; the "parade of horrors" imagined by Petitioners has never materialized.

Finally, the Court should reject the "parade of horrors" Petitioners speculate will occur in the absence of review. Petitioners stridently claim:

> "The Ninth Circuit's rule subjects virtually all state and local government regulation touching land in the western third of the United States to illogical and unjustifiably intense judicial second-guessing, fomenting extensive, expensive litigation under a fundamentally incoherent constitutional doctrine. This Court should take responsibility for clearing up this dangerous confusion. . . . "

Petition, pp. 14-15.

This argument misses the point, however, because it wrongly assumes that the rule applied by the Ninth Circuit first saw the light of day in this action. But as noted above, the Ninth Circuit did not break new ground in this case. Instead, it applied long settled rules announced decades ago by *this* Court.[7] *Agins* has been the law for

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[7] Petitioners imply that the Ninth Circuit acted without authority in developing the law, arguing that "[s]ince 1996, however, the Ninth Circuit has insisted that challenges to the rationality and validity of land use regulation not only may but

more than twenty years. If waves of "judicial second-guessing" and "extensive, expensive litigation" imagined by Petitioners were going to occur, that would have already happened.

Nor can Petitioners claim that this is the first case to apply the *Agins* rule in the rent control context. This Court plainly raised the possibility nearly a decade ago that a rent control law might be challenged where its only result was to transfer an economic premium to incumbent tenants. *Yee v. City of Escondido, supra,* 503 U.S. at 530.[8] In

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must be analyzed under the Takings Clause, rather than under the Due Process Clause." Petition, p. 5. What Petitioners fail to note, however, is that the holding in each of the Ninth Circuit Takings cases they cite is firmly grounded in this Court's precedents. *See Richardson v. City and County of Honolulu, supra,* 124 F.3d at 1165-1166 (following *Nollan v. California Coastal Commission, supra,* 483 U.S. at 834); Pet. App., p. 13 (reciting test from *Agins v. City of Tiburon, supra,* 447 U.S. at 260 and citing *Yee v. City of Escondido, supra*). *Armendariz v. Penman,* 75 F.3d 1311 (9th Cir. 1996), cited at note 1 of the Petition, was not relied on by either the district court or the Ninth Circuit in this case. *Armendariz* addressed the scope of official immunity. It grew out of alleged pretextual "building code enforcement sweeps" done by the City of San Bernardino allegedly so property owners would default, allowing a shopping center developer to obtain the property inexpensively. *Id.* at 1313, 1321. *Armendariz* does not address the proper test for determining whether a regulatory taking has occurred.

[8] The Court in *Yee* observed that a premium transfer like the one in this case "might have some bearing on whether the ordinance causes a regulatory taking, as it may shed some light on whether there is a sufficient nexus between the effect of the ordinance and the objectives it is supposed to advance." *Id.* at 530. But the Court did not reach the issue in *Yee* because the only question properly before the Court was whether the City of

addition, more than three years ago, the Ninth Circuit itself applied the very test Petitioners here challenge to invalidate a *residential* rent control ordinance passed by the City and County of Honolulu. *Richardson v. City and County of Honolulu*, 124 F.3d 1150, 1165-1166 (9th Cir. 1997), *cert. denied*, 525 U.S. 871 (1998). The Ninth Circuit expressly relied on *Richardson* as controlling in this case. *See* Pet. App., pp. 7-8, 12, 13.

In short, Petitioners' speculation about the effect of the Ninth Circuit's decision is belied by history. The rule Petitioners assert must be changed has in fact been the law for decades with none of the predicted dire consequences having materialized. At the very least, twenty years' experience with the "substantially advances" test suggests that there is little – if any – practical risk in waiting until after the factual record is more fully developed in the district court to consider reviewing this matter.

III. REVIEW IS UNWARRANTED AT THIS TIME, GIVEN THE NINTH CIRCUIT'S DECISION TO REMAND THE CASE FOR FURTHER DEVELOPMENT OF THE FACTUAL RECORD.

The Petition should be denied as premature, given the procedural posture of this case. This is a Takings

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Escondido's mobile home rent control law effected a *physical taking* of the landlord's property. The Court concluded that the premium transfer "has nothing to do with whether the ordinance causes a physical taking." *Id.* Here, of course, there is no claim that Act 257 caused a *physical taking* of Respondent's property.

Clause case. But as the case stands before the Court, there has been no final determination whether Act 257 effects a taking. The Ninth Circuit has remanded this case to the district court for further fact-finding. Pet. App., p. 25. That fact-finding will include an evaluation by the lower court of the credibility of the evidence proffered by both parties to determine if Act 257 effects a regulatory taking. Pet. App., pp. 15-20. At this point, it is uncertain whether there will *ever* be a finding that a taking has occurred. Accordingly, the Petition is premature and asks this Court to render a potentially advisory opinion:

> "We call to mind two of the cardinal rules governing the federal courts: [one], never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied."

Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 501 (1985) (internal quotations omitted).

It is well settled that this Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Virginia Military Institute v. United States*, 508 U.S. 946 (1993) (Scalia, J., concurring) (citing *American Construction Co. v. Jacksonville, T & K, W.R. Co.*, 148 U.S. 372, 384 (1893)). As discussed above, granting review at this stage of the proceedings is premature in light of the further factual development that must occur upon remand to the district court. In addition, no circumstances are present here that warrant immediate review.

Citing *Mazurek v. Armstrong*, 520 U.S. 968 (1997), Petitioners assert that the issue presented has "present consequences" that require immediate review. Petition, p. 23. This case, however, is readily distinguishable from *Mazurek*. First, unlike *Mazurek*, this is not a case where the courts below applied a legal standard that is contrary to established precedent of this Court. *Id.* at 975 ("[T]he Court of Appeals' decision is clearly erroneous under our precedents."). Rather, both the district court and the Ninth Circuit applied a legal standard in this case that was adopted more than twenty years ago by this Court in *Agins v. City of Tiburon, supra.* Moreover, Petitioners do not contend that the lower courts in this case erred by applying the standard set forth in *Agins*; instead, they are asking this Court to overrule *Agins* and its progeny.

Second, after applying the wrong legal standard, the court of appeals in *Mazurek* had issued an injunction against implementation of the law at issue, pending the district court's resolution of the respondent's motion for preliminary injunction upon remand. *Mazurek v. Armstrong, supra*, 520 U.S. at 975. The Court noted that the injunction issued by the Ninth Circuit Court of Appeals in *Mazurek* "produced immediate consequences" for the State of Montana and created a risk that other lower courts within the Ninth Circuit might strike down similar legislation if this Court waited until a final decision was rendered before granting review. *Id.* at 975-976. Again, no such "immediate consequences" are present here. The *Agins* test is long settled authority of this Court *and* the district court must still determine upon remand whether a taking has even occurred.

Citing *United States v. General Motors*, 323 U.S. 373 (1945), Petitioners further assert that the Court should review this case now because "the decision below is 'fundamental to the further conduct of this case.' " Petition, p. 23. In *General Motors*, however, the Court decided in the eminent domain context an "issue of first impression" upon which numerous lower courts were in conflict. *United States v. General Motors, supra*, 323 U.S. at 374-375. As noted above, the standard set forth in *Agins* has been the law for more than twenty years, and contrary to Petitioners' assertions, there is no urgency to review the long-settled *Agins* rule at this stage of the case.[9]

IV. NEITHER THE RECORD NOR THE DECISION BELOW RAISES THE SECOND QUESTION PRESENTED BY THE PETITION.

Petitioners contend that this action presents two separate questions. The second question reads as follows:

> "Does the facial constitutional validity of state legislation depend on whether a federal court predicts that it will achieve its objective?"

Petition, p. i. Neither the record nor the Ninth Circuit's opinion raises this question, and it would be inappropriate for the Court to grant the writ on this basis.

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[9] Citing cases from the Court of Federal Claims, Petitioners assert that there may be a split among the circuits on this issue. Petition, p. 10. However, even Petitioners concede that those decisions may be explained by the Federal Court of Claims' "sensitivity to limitations on the liability of the United States under the Tucker Act." *Id.*

With this question, Petitioners raise a straw man argument: Must a court predict *guaranteed* success for a statute – i.e., that it *"will achieve"* its objective – to sustain its constitutionality? Respondents never claimed that to be the standard against which Act 257 must be judged, and the Ninth Circuit expressly *rejected* it as well. Having held that the district court must consider whether Act 257 *substantially* advances a legitimate state interest, the Ninth Circuit commented:

> "Whether the price of gasoline will remain the same here is vigorously contested. The mere possibility that it will does not satisfy Chevron's burden of proving that Act 257 does not substantially further its purpose. Logically, there must be a determination of the likelihood of that possibility. *Otherwise, regulatory legislation would be unconstitutional any time it was not absolutely guaranteed to achieve its purpose.* . . . Surely the 1% chance that it would be ineffective does not, as a matter of law, mean that the statute does not 'substantially advance' its purpose. [¶] . . . Had the test been intended to require an absolute cause-and-effect relationship, the word 'substantially' would have no meaning."

Pet. App., p. 22 (emphasis added).

The second question posed by Petitioners is also too broad. As noted above, this action arose under the Takings Clause, and the Ninth Circuit's holding is limited to the Takings Clause. But Petitioners' second question raises an issue untethered to any particular provision of

the Constitution. There is no basis on this record for the Court to consider such an apparently broad-ranging issue.

CONCLUSION

For all the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

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